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No. ——

In The Supreme Court of the United States

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Petitioner,

v.

MICHAEL SWANKS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court of appeals' June 18, 1999 decision, issued four days before the Court's three decisions addressing the scope of the Americans With Disabilities Act ("ADA"), should be remanded for further consideration in light of this Court's new decisions?

2. Whether this Court should resolve the existing conflict among the circuits on the issue of whether Eleventh Amendment/sovereign immunity bars an ADA action against a state-level governmental entity such as WMATA?

3. Whether this Court should stay action on the instant Petition pending this Court's decision in *Kimel v. Florida Board of Regents*?

LISTING OF AFFILIATES PURSUANT TO RULE 29.1

Pursuant to Rule 29.1, Respondent Washington Metropolitan Area Transit Authority ("WMATA") states that it is an agency and instrumentality of Maryland, Virginia, and the District of Columbia created by an interstate compact, as authorized by Congress. *See* Pub. L. No. 89-774. WMATA operates a regional transportation system in the Washington, D.C. metropolitan area. As a governmental entity, WMATA does not have any parent corporation, affiliates, or subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

The Washington Metropolitan Area Transit Authority ("WMATA") respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-13a) is reported at 179 F.3d 929. The decision of the district court (App., *infra*, 14a) is unreported.

JURISDICTION

The court of appeals entered its judgment on June 18, 1999. (App., *infra*, 1a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 102(a) of the Americans With Disabilities Act, 42 U.S.C. § 12112(a), provides that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."

STATEMENT OF THE CASE

A. Parties.

Plaintiff-Respondent Michael Swanks was hired as a special police officer in 1989 by Defendant-Petitioner Washington Metropolitan Area Transit Authority ("WMATA"). (App. 2a). WMATA is an interstate compact agency and instrumentality of Maryland, Virginia, and the District of Columbia which operates the Metrorail and Metrobus systems in the Washington, D.C. metropolitan area. *See* Pub. L. No. 89-774; Md. *Transp.* Code Ann. § 10-204; and D.C. Code Ann. § 1-2431.

B. Jurisdiction.

The district court has jurisdiction in general as to actions involving WMATA pursuant to § 81 of the WMATA Compact, reprinted at Md. *Transp.* Code Ann. § 10-204(81) and D.C. Code Ann. § 1-2431(81). *See also* 28 U.S.C. § 1331. The jurisdiction of the court of appeals was predicated upon 28 U.S.C. § 1291. The jurisdiction of this Court is predicated upon 28 U.S.C. § 1254(1).

C. Proceedings Below.

Mr. Swanks filed this action on November 8, 1994 against WMATA alleging violations of the Americans With Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq*. Specifically, Mr. Swanks alleged that WMATA failed to accommodate reasonably his medical condition (spina bifida) and discriminated against him in connection with his termination from his job.

Following discovery, the District Court granted WMATA's Motion for Summary Judgment on April 4, 1996 premised on certifications made by Mr. Swanks in his successful application for disability benefits. In *Swanks v. WMATA*, 116 F.3d 582, 583 (D.C. Cir. 1997) (*Swanks* I), the court of appeals reversed, holding that the receipt of disability benefits under the Social Security Act did not bar recovery under the ADA. Upon remand, a jury found for WMATA on Mr. Swanks' claim that WMATA had failed to accommodate his request for additional exercise, and for Mr. Swanks on the question of whether WMATA fired him because of his disability. The jury awarded him $125,000 in compensatory damages and the District Court awarded him $83,929 in back pay. WMATA timely appealed.

On June 18, 1999, the court of appeals affirmed the judgment of the district court. *Swanks v. WMATA*, 179 F.3d 929 (D.C. Cir. 1999) (*Swanks* II). The court of appeals held that there was sufficient evidence on which the jury could reasonably find that Mr. Swanks was significantly impaired in the major life activity of working and that his termination was discriminatory.

D. Mr. Swanks' Medical Condition.

Mr. Swanks suffers from a congenital condition known as spina bifida. (App. 2a). Unlike more severe forms

of this condition which involves mobility impairment of varying degrees, Mr. Swanks' symptoms affect his urinary tract and lead to incontinence and an increased susceptibility to infections. (App. 2a).

E. Termination of Employment.

WMATA Transit Police Officers such as Mr. Swanks were required to obtain a special police commission license issued by the District of Columbia Metropolitan Police Department. Each police officer must renew this commission once a year. If the commission lapses for more than one year, the officer must go through a lengthy reapplication process. (C.A. App. 126-31). Mr. Swanks let his commission expire for over a year and was subsequently terminated. (App. 4a).

REASONS FOR GRANTING THE PETITION

There are three separate and independent reasons for granting the Petition. *First*, the court of appeals' June 18, 1999 decision predated, and is inconsistent with, this Court's June 22, 1999 decisions interpreting the underlying standards for ADA cases in *Sutton v. United Air Lines*, 527 U.S. ——, 119 S. Ct. 2139 (1999); *Murphy v. United Parcel Service, Inc.*, 527 U.S. ——, 119 S. Ct. 2133 (1999); and *Albertson's Inc. v. Kirkingburg*, 527 U.S. ——, 119 S. Ct. 2162 (1999). At a minimum, the case should be remanded to the court of appeals for reconsideration in light of this Court's intervening decisions.

Second, there is a conflict between the decision below, affirming an ADA judgment against WMATA, a governmental entity possessing sovereign immunity, and the en banc decision of the Eighth Circuit in *Alsbrook v. City of Maumelle*, —— F.3d ——, 1999 WL 521709 (8th Cir. July 23, 1999) (en banc), holding that the Eleventh

Amendment bars suits in federal courts by individuals against state governments under the ADA.

Third, alternatively, the Court should stay action on the instant Petition pending a decision in *Kimel v. Florida Board of Regents*, Nos. 98-791 and 98-796, scheduled for oral argument on October 13, 1999.

I. THE COURT OF APPEALS' DECISION IS INCONSISTENT WITH THE STANDARDS SUBSEQUENTLY ENUNCIATED BY THIS COURT IN *SUTTON, MURPHY*, AND *KIRKINGBURG*.

The court of appeals' decision was issued on June 18, 1999, just four days before this Court issued its decisions in *Sutton*, *Murphy*, and *Kirkingburg*. In these cases, this Court specifically defined the parameters on what a disability is for purposes of the ADA. For example, in *Sutton*, 119 S. Ct. at 2147, in holding that nearsighted individuals applying for pilots' positions were not disabled under the ADA, this Court stated that "[t]he determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual." Similarly, in *Kirkingburg*, 119 S. Ct. at 2168, this Court noted "the fundamental statutory requirement that only impairments causing 'substantial limitat[ions]' in individuals' ability to perform major life activities constitute disabilities."

Based on the newly enunciated standards of this Court stemming from these June 22, 1999 decisions, it is clear that the assumption underlying the court of appeals' decision that Mr. Swanks had a disability within the meaning of the ADA must be revisited. Here, the record is uncontroverted that Mr. Swanks was able to function as a WMATA special police officer with assignments in the field. The urinary difficulties he experienced in connec-

tion with his spina bifida condition were insufficient to establish that he has a disability within the meaning of the Act. This Court specifically emphasized in *Sutton* that corrective and mitigating measures must be considered in determining whether an individual is substantially limited in a major life activity. Consequently, this issue must be looked at on a case-by-case basis. In light of the new guidance given by this Court after the court of appeals' decision in the instant case, WMATA respectfully requests that the petition be granted and, at a minimum, the case be remanded to the court of appeals for further consideration of whether Mr. Swanks can even be considered substantially limited in a major life activity under the new precedent of this Court.

II. THE PETITION SHOULD BE GRANTED TO RESOLVE THE SPLIT IN THE COURTS OF APPEALS REGARDING WHETHER STATE-LEVEL SOVEREIGN ENTITIES SUCH AS WMATA ARE IMMUNE FROM SUIT UNDER THE ADA.

On July 23, 1999, the en banc United States Court of Appeals for the Eighth Circuit held in *Alsbrook v. City of Maumelle,* —— F.3d ——, 1999 WL 521709 (8th Cir. July 23, 1999) that the plaintiff's ADA claim against the State of Arkansas was barred by the Eleventh Amendment. Based on this Court's decision in *City of Boerne v. Flores,* 521 U.S. 507 (1997) and *Seminole Tribe v. Florida,* 517 U.S. 44 (1996), the Eighth Circuit held that the ADA exceeded Congress' Fourteenth Amendment enforcement powers.

Alsbrook is in conflict with the decision below, as well as with decisions from other courts of appeals. *See Kimel v. State of Florida Board of Regents,* 139 F.3d 1426, 1433 (11th Cir. 1998), *cert. granted on other grounds,* 119 S. Ct. 901, 902 (1999). The issue of whether governmental entities such as WMATA are subject to suit

under the ADA has obvious and considerable importance. *See Hess v. Port Authority Trans-Hudson*, 513 U.S. 30, 49 (1994) (citing with approval *Morris v. WMATA*, 781 F.2d 218 (D.C. Cir. 1986), which in turn recognizes WMATA's Eleventh Amendment/sovereign immunity); *see also Alden v. Maine*, 527 U.S. ——, 119 S. Ct. 2240 (1999). A prompt resolution of this issue, now that there is a conflict amoung the circuits, will further judicial economy and minimize litigation expenditures in numerous federal cases.

III. ALTERNATIVELY, THE COURT SHOULD STAY A DECISION ON THE INSTANT PETITION PENDING THIS COURT'S DECISION IN *KIMEL*.

The Court has scheduled oral argument on October 13, 1999 in *Kimel v. State of Florida Board of Regents, supra.* Although the Court granted certiorari with respect to the Age Discrimination in Employment Act ("ADEA") Eleventh Amendment issues (Nos. 98-791 and 98-796), and not the ADA issue (a petition for certiorari is pending in No. 98-829 on the ADA/Eleventh Amendment issue), the Court's decision in *Kimel* will likely lend guidance on the ADA issue, even if not directly decided. Consequently, as an alternative argument, WMATA respectfully requests that the Court stay a decision on the instant Petition pending the decision in *Kimel*.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued April 29, 1999 Decided June 18, 1999

No. 98-7115

MICHAEL SWANKS,

Appellee

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,

Appellant

Appeal from the United States District Court
for the District of Columbia
(No. 94cv02421)

Before: EDWARDS, *Chief Judge*, WALD and ROGERS, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* ROGERS.

ROGERS, *Circuit Judge*: In *Swanks v. WMATA*, 116 F.3d 582, 583 (D.C. Cir. 1997) (*"Swanks I"*), the court held that receipt of disability benefits under the Social Security Act, *see* 42 U.S.C. § 423 (1994), did not bar recovery under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 (1994), *et seq.*, and remanded the case to the district court for a jury to de-

termine whether the Washington Metropolitan Area Transit Authority ("WMATA") had discriminated against Michael Swanks. *See* 116 F.3d at 587-88. Thereafter a jury found for WMATA on Swanks' claim that WMATA had failed to accommodate his request for additional exercise, and for Swanks on the question of whether WMATA had fired him because of his disability. On appeal, WMATA contends that Swanks failed to show that he remained qualified for his position as a special police officer once his commission as a special police officer under District of Columbia law expired, and that he had been discriminated against because of his disability. Inasmuch as the only question before this court is whether, absent an error of law by the district court, no reasonable juror could find that WMATA discriminated against Swanks because of his disability, and there was no legal error and ample evidence on which the jury could reasonably find discrimination, we affirm.[1]

I.

Michael Swanks suffers from a congenital condition known as spina bifida, which affects his urinary tract and leads to incontinence and infections. At the time he was hired in 1989 by WMATA as a special police officer, Swanks informed an interviewer and a WMATA examining physician of his condition. He initially worked at locations in the Distirct of Columbia, Virginia, and Maryland, but his work site "stabilized" in 1991 when he be-

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[1] On April 8, 1999, the court denied WMATA's motion to postpone oral argument in view of the Supreme Court's grant of a petition for writ of certiorari in *Cleveland v. Policy Management Sys. Corp.*, 120 F.3d 513, 518 (5th Cir. 1997). *See* 119 S. Ct. 39 (1998). The Supreme Court has since decided *Cleveland* and its disposition has no bearing on the issue before this court. *See Cleveland v. Policy Management Sys. Corp.*, No. 97-1008, 1999 WL 320795 (May 24, 1999).

gan working at the West Falls Church METRO stop in Virginia. Viewing the evidence most favorably to Swanks, as we must, *see Boodoo v. Cary*, 21 F.3d 1157, 1159, 1161-62 (D.C. Cir. 1994); *Anderson v. Group Hospitalization, Inc.*, 820 F.2d 465, 471-72 (D.C. Cir. 1987), Swanks missed work a few more days than allowed as a result of his condition and provided doctor's certificates regarding his absences.[2] His performance reviews described him as generally effective and competent, but one noted that his "unscheduled absences . . . indicate[] a lack of stability which has affected his leadership." In June 1991 he received a letter warning him that "further unscheduled absence could lead to more severe disciplinary action." The following month he provided WMATA with a letter from his doctor explaining that he had spina bifida and that it affected his urinary tract; a few days later, he provided a doctor's statement describing the symptoms as fever, vomiting, diarrhea, nausea, frequent urination, and lower back pain—many of the reasons that Swanks had described when taking sick leave. In addition, Swanks testified that he discussed his symptoms with his WMATA supervisors and doctors. Yet in late 1992, when he asked if he could get either more exercise to accommodate these symptoms or a transfer, Darryl Rice, the captain of WMATA's special police officers, told him that WMATA's tight financial situation made that impossible and that "[t]he best thing for [Swanks] to do was resign and go in[to] the construction field."

In September 1992, as part a system-wide spot check, a supervisor asked to see Swanks' special police commission. Swanks stated that it was in his wallet, which he had left

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[2] Swanks testified that he used his sick leave only when he was sick, using twelve days in 1989-90, 18 days in 1990-91, and 22 days in 1991-92. Swanks also testified that he used annual leave for vacation and to care for his wife when she was sick.

the day before with his brother-in-law. Upon retrieving the wallet, however, he discovered that the commission was missing and went to the D.C. Metropolitan Police Department for a replacement. He was unaware before then that his commission had expired over a year earlier. Captain Rice subseqeutly recommended that Swanks be dismissed for not having his commission and for lying about having lost it when WMATA asked if he had it. In October, Swanks was dismissed from his job. When his wife telephoned to ask why her husband was being fired, Captain Rice told her that the termination was due to her husband's absences and not the expiration of the "gun permit." Swanks filed suit under the ADA, alleging that WMATA failed to provide reasonable accommodation for his disability and that it discharged him because of his disability.

II.

Although the court reviews *de novo* the denial of WMATA's motion for judgment as a matter of law, or in the alternative, for a new trial, *see Scott v. District of Columbia,* 101 F.3d 748, 752 (D.C. Cir. 1996), it is long settled that "the jury's verdict will withstand challenge unless the evidence and all reasonable inferences that can be drawn therefrom are so one-sided that reasonable men and women could not disagree on the verdict." *Id. at* 753. Because the evidence presented by the plaintiff must be "significantly probative," rather than "merely colorable," *Siegel v. Mazda Motor Corp.,* 878 F.2d 435, 437 (D.C. Cir. 1989), "the question for us is not whether there was *some evidence,* but whether, in terms of the actual quantum and quality of proof necessary to support liability, there was *sufficient evidence* upon which a jury could properly base a verdict for the [plaintiff]." *Id.* (quotation marks omitted). In other words, if there was no error of law by the district court in allowing issues to be

represented to the jury, the remaining question is whether no reasonable juror could find that WMATA had fired Swanks for a discriminatory reason. *See Anderson,* 820 F.2d at 472-73; *cf. Milone v. WMATA*, 91 F.3d 229, 232 (D.C. Cir. 1996).

A.

Under the now familiar three-part protocol established in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802 (1973), and further elaborated upon in *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 252-53 (1981), and *St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 506 (1993), the plaintiff bears the initial burden to establish by a preponderance of the evidence a *prima facie* case of discrimination. The employer then bears the burden to produce evidence of a legitimate non-discriminatory reason for its action. *See Aka v. Washington Hosp. Ctr.,* 156 F.3d 1284, 1289 (D.C. Cir. 1998) (in banc). If the employer can meet this burden of production,

> the focus of proceedings at trial . . . will be on whether the jury could infer discrimination from the combination of the plaintiff's *prima facie* case; (2) any evidence the plaintiff presents to attack the employer's proffered explanation for its actions; and (3) any further evidence of discrimination that may be available to the plaintiff (such as independent evidence of discriminatory statements or attitudes on the part of the employer) or any contrary evidence that may be available to the employer (such as evidence of a strong track record in equal opportunity employment).

Id. at 1289. The plaintiff retains the ultimate burden of persuasion, to demonstrate that he was in fact the victim of intentional discrimination. *See id.* at 1290.

To sustain a claim under the ADA, Swanks must prove that he had a disability within the meaning of the ADA, that he was "qualified" for the position with or without a reasonable accommodation, and that he suffered an adverse employment action because of his disability. *See Kiel v. Select Artificials, Inc.*, 169 F.3d 1131, 1135 (8th Cir. 1999); *Martinson v. Kinney Shoe Corp.*, 104 F.3d 683, 686 (4th Cir. 1997); *White v. York Int'l Corp.*, 45 F.3d 357, 360-61 (10th Cir. 1995). On appeal, WMATA contends that Swanks was unqualified for his position and therefore cannot establish a *prima facie* case of discrimination. It further contends that the evidence demonstrated that WMATA terminated Swanks for legitimate, non-discriminatory reasons, specifically that "he did not have a valid police commission and he lied about the status of the license."

The ADA provides that "[n]o covered entity shall discriminate against a *qualified individual* with a disability because of the disability . . . in regard to . . . discharge of employees . . . and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a) (1994) (emphasis added). The Act defines a "qualified individual" as a person "with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." *Id.* § 12111(8). It further provides that "consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job." *Id.; cf. Carr v. Reno*, 23 F.3d 525, 529 (D.C. Cir. 1994).

Whether an individual is "qualified" for a job may at times present a pure question of law or be resolved by the

court, but it may also, as in this case, be a question of fact that must be resolved by a fact-finder at trial. Thus, for example, in *Baert v. Euclid Beverage, Ltd.*, 149 F.3d 626 (7th Cir. 1998), the Seventh Circuit concluded that a factual dispute existed as to whether an employer required a certain type of employee to have a commercial driver's license and consequently, the employer "may not obtain summary judgment by declaring it has a policy when [the employee] may have evidence that [the employer] follows the policy [of requiring commercial licenses] selectively." *Id.* at 632; *see also Griffith v. Wal-Mart Stores, Inc.*, 135 F.3d 376, 383-84 (6th Cir. 1998). The issue of qualification in the instant case involved a similar factual dispute.

WMATA contends that the district court erred in denying its motion for judgment as a matter of law because the evidence showed that possessing a special police commission is a requirement for Swanks' position and that Swanks was therefore not qualified because he had allowed his commission to expire. The special police officer commission, WMATA contends, is "tantamount to a professional license and . . . without this license there is no authority to act in the capacity of special police officer." In WMATA's view, the job description combined with Captain Rice's testimony "made it clear that an essential requirement of the job of special police officer was the maintenance and possession of a special police commission." Specifically, Captain Rice testified that the special commission was required of all special police, including those stationed in Virginia or Maryland, because "we work out of the District of Columbia," which requires the license and which covers 90 to 95 percent of Metro locations.[3] He also tes-

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[3] *See* D.C. CODE ANN. § 4-114 (1994) (conferring authority on the Mayor to appoint special police officers).

tified that if the D.C. Metropolitan Police discover a special officer operating without a commission in the District, WMATA and the officer can be fined.[4]

The difficulty with WMATA's position is twofold. First, WMATA's personnel description of the special police officer job states that an individual only need have the "[a]bility to obtain and maintain a Special Police Commission." The "minimum qualifications and experience" include only that the applicant have graduated from high school (or received an equivalent certificate), and be at least 21 years old and a United States citizen (or have an equivalent combination of education and experience); there is no mention of the commission. If after obtaining the commission, the officer allows it to expire, official WMATA policy provides that expiration "will result in your not being permitted to work until the job position requirement is met;" it does not provide for automatic discharge. Second, Swanks testified that in practice WMATA only required that he have the ability to maintain the commission. When he initially informed a supervisor that he had lost his commission, he testified that he was informed that he "did not need a gun permit to work in the State of Virginia" and that he was to report to work. Similarly, when it later was clear his commission had expired, he was told that he would be on leave until he renewed it. This evidence of WMATA's practice was supported by

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[4] *See* D.C. Mun. Regs. tit. 6A, §§ 1101.2, 1104.2, 1108.1 (1988). Section 1104.2 of Title 6A provides that:

> Each special police officer appointed under the provisions of D.C. Code § 4-114 (1981), shall, within twenty-four (24) hours after the expiration or revocation of his or her commission . . . deliver to the Chief of Police his or her badge, commission, or other emblem of authority, and upon his or her failure so to do, he or she shall, upon conviction thereof in the Superior Court for the District of Columbia, be punished by a fine or [*sic*] not more than three hundred dollars ($300).

Captain Rice's testimony describing how new employees would apply for the commission after being hired and that the application process could last four to eight months.

The district court, therefore, properly denied WMATA's motion for judgment as a matter of law in light of evidence making qualification an issue of fact. Based upon the evidence, a reasonable juror could find that possessing the commission was not a prerequisite to being hired, and that new employees simply had to possess the *ability* to obtain such a commission, and hence the jury had sufficient evidence to find that Swanks was a "qualified individual" with a disability under the ADA.

B.

The question remains whether WMATA presented a non-discriminatory reason for discharging Swanks and if so, whether Swanks presented evidence upon which a reasonable juror could rely to conclude that WMATA's true motivation for firing him was discriminatory. Our standard of review here is deferential: a jury's verdict may be overturned only if no reasonable juror could find that WMATA discriminated against Swanks. *Anderson,* 820 F.2d at 472-73. The court considers all of the evidence that the jury had before it, not only Swanks' *prima facie* case but also his evidence that he was fired for his absences rather than his lack of a special commission. *Aka,* 156 F.3d at 1289.

The evidence before the jury as to WMATA's true reason for terminating Swanks was conflicting. On the one hand, Captain Rice testified, and his memorandum recommending Swanks' dismissal stated, that the cause of Swanks' discharge was the expiration of the special commission and Swanks' alleged fabrications when WMATA asked to see his commission. On the other hand, Swanks testified that he was unaware that his commission, which

he believed he had lost, had expired.[5] Furthermore, his wife's testimony, that Captain Rice had told her that her husband's absences, rather than the "gun permit," was the reason for his discharge, was bolstered by evidence that WMATA had threatened disciplinary action because of his absences and had been unreceptive to his attempts, with doctor's statements, to explain how his condition caused these absences.[6]

The issue of witness credibility "is quintessentially one for the finder of fact," *Aka,* 156 F.3d at 1299; *see also Baert,* 149 F.3d at 633, and the medical evidence permitted a reasonable juror to find that Swanks' absences were due to his disability. A reasonable juror could find that WMATA, being unwilling to tolerate an employee with repeated absences, decided to apply its special commission requirement more strictly than it normally would to remove Swanks because of his disability. In that sense, WMATA's contention that this case is about applying the same rules to persons with disabilities as those without is somewhat ironic inasmuch as the jury apparently accepted Swanks' position that WMATA applied its commission requirement inconsistently as an excuse to discharge

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[5] Although Swanks maintains that WMATA presented "no evidence of untruthfuulness," Captain Rice's October 1992 memorandum stated that "Officer Swanks' inability to provide a copy of his D.C. Special Police Commission and his subsequent story of his "brother-in-law" taking his wallet only emphasises [*sic*] that he: a) was aware that his commission was invalid; [and] b) wanted to have time to get to MPD [Metropolitan Police Department] to obtain a renewal," and further, that Swanks admitted to MPD Detective Owens that he was aware his commission had expired "but only after he was confronted with the information."

[6] This evidence contradicts WMATA's statement in its brief that it "had no way of knowing that Mr. Swanks' excessive absenteeism was a result of his spina bifida occulta."

him, applying a harsher rule, rather than the same rule, to Swanks because of his disability.[7]

To the extent that WMATA contends for the first time in its reply brief, and at oral argument, that even if Swanks could show that he was fired for excessive absenteeism, regular attendance at work is an "essential function" of his job, its argument comes too late.[8] *See Chedwick v. Nash*, 151 F.3d 1077, 1084 (D.C. Cir. 1998). At trial, WMATA only argued that Swanks was unqualified

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[7] Citing *Proud v. Stone*, 945 F.2d 796, 798 (4th Cir. 1991), WMATA contends that it would be irrational for it to hire Swanks knowing of his disability only to fire him because of that same condition. This argument is specious, however for, unlike the facts in *Proud*, different individuals hired Swanks in 1989 (*i.e.* then-Lieutenant Kielbiewicz) then fired him several years later in 1992 (*i.e.* Captain Rice, Inspector Robert Zaza, and Chief of WMATA Police Burton Morrow). Furthermore, *Proud* was an age discrimination case. Age is a fixed variable; here it is possible that WMATA may not fully have appreciated the amount of absenteeism that would be required for Swank's disability, or that his condition could have worsened over time, requiring greater absenteeism. *Cf. id.* at 797-98; *Waldron v. SL Indus.*, 56 F.3d 491, 496 n.6 (3d Cir. 1995).

[8] WMATA's regulations provide that a special police officer "*must be* dependable, regular in attendance and never absent from work without making advance arrangements with the sergeant except in the case of illness or extreme emergency." Def.'s Ex. 7, ¶ 10 (Protective Services Bureau Rules & Regulations for Special Police Officers). They also define "unsatisfactory attendance" as "unscheduled absences so frequent as to indicate that the employee is undependable." *Id.* ¶ 24. Captain Rice testified that special police officers accrue 3.75 hours of sick leave and 3.75 hours of annual leave every two weeks, in addition to federal holidays. Over the course of approximately 26 pay-periods an officer would therefore annually accrue 97.5 hours of sick leave. Although Captain Rice testified that officers accrue approximately 10 to 11 days of sick leave per year, with a tour of duty lasting 7.5 hours, the number of sick days would equal 13 (97.5 divided by 7.5). By that calculation, Swanks used less than the full annual amount of sick leave during his first year and exceeded that amount by five days in his second year and nine days in his third year.

for his position, not that he was fired because of abuse of his sick leave. Trial Tr. at 87:1-4 (Apr. 9, 1998). Abuse of sick leave as the reason for dismissal would contradict both Captain Rice's testimony and his memorandum recommending Swanks' dismissal for failure to have a valid commission and lying about it. Moreover, during closing arguments, WMATA disavowed any conection between Swanks' absences and its decision to terminate him. In that light, "if the only explanations set forth [by the employer] in the record have been rebutted, the jury is permitted to search for others, and may in appropriate circumstances draw an inference of discrimination. *Aka*, 156 F.3d at 1292. The jury need not adopt a potentially non-discriminatory explanation that the employer itself has attempted to discredit.[9]

Finally, WMATA contends in its reply brief that even if it "had full knowledge that Mr. Swanks' absenteeism was caused by his disability, there can be no finding of discrimination because the jury found against Mr. Swanks on the accommodation issue [claim]." Because Swanks had no opportunity to respond to this contention in his brief, the court need not consider it. *See Herbert v. Na-*

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[9] WMATA's reliance on *Carr v. Reno*, 23 F.3d 525 (D.C. Cir. 1994), is to no avail. *Carr* was a summary judgment case; by contrast our review of the jury's verdict is not *de novo*, and WMATA did not present evidence, in response to Swanks' *prima facie* case, that he was fired for excessive absenteeism. *Carr*'s excessive absenteeism theory could have been applicable had WMATA presented such evidence; a jury then might have concluded that his absences were so "prolonged, frequent, and unpredictable" as to make him unqualified to perform the essential functions of a time-sensitive job. *Id.* at 530; *cf. Carpenter v. Federal Nat'l Mortgage Ass'n*, 165 F.3d 69, 72 (D.C. Cir. 1999). However, WMATA would still have to show in the instant case that no reasonable juror could have found that discrimination, rather than lack of qualification or undue hardship, was the true motivation for Swanks' discharge. *See generally Barth v. Gelb*, 2 F.3d 1180, 1186-87 (D.C. Cir. 1993); *Anderson*, 820 F.2d at 472.

tional Acadamy of Sciences, 974 F.2d 192, 196 (D.C. Cir. 1992). Even if the contention were facially appealing, Swanks' accommodation request was to be allowed more exercise at work and more sick leave as a way to ward off some of the symptoms of his condition that caused his absences.[10] Finding against him on that claim, a juror could still reasonably find that WMATA fired Swanks because of his disability in violation of the ADA. As the court recognized in *Aka*, a reasonable accommodation claim "is not subject to analysis under *McDonnell-Douglas*, but has its own specialized legal standards." 156 F.3d at 1288.

Accordingly, we affirm the judgment.

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10 Although in *Swanks I* the court characterized this claim as a request for more exercise, *see Swanks*, 116 F.3d at 583, during rebuttal closing argument, Swanks' counsel stated that Swanks also wanted more sick leave as an accommodation.

APPENDIX B

[Filed May 26, 1998]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. 94-2421 PJA

MICHAEL SWANKS,

Plaintiff,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,

Defendant.

ORDER

Upon consideration of the defendant's renewed motion for judgment as a matter of law and in the alternative for a new trial, the opposition, the entire record and the applicable law, the Court finds and concludes that the issues presented for trial involved matters of fact to be resolved by a jury and that the jury's verdict was supported by the evidence.

Accordingly, it is this 22 day of May, 1998

ORDERED that the defendant's motion be, and hereby is, DENIED.

/s/ Patrick J. Attridge
PATRICK J. ATTRIDGE
U.S. Magistrate Judge

Supreme Court, U.S.
FILED
NOV 9 1999
CLERK

No. 99-461

IN THE
Supreme Court of the United States

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Petitioner,

v.

MICHAEL SWANKS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether it is appropriate for this Court to consider whether Michael Swanks' congenital birth defect, and its consequential urinary incontinence, constitutes a disability under the Americans With Disabilities Act, when the question was not presented to the Court of Appeals.

2. Whether there is any reason to revisit this Court's five year old decision in *Hess v. Port Authority Trans-Hudson,* 513 U.S. 30 (1994), when no question of Eleventh Amendment Immunity was raised in the Court of Appeals.

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IN THE

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WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
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v.

MICHAEL SWANKS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION

Michael Swanks, respondent herein, respectfully opposes the Petition for Writ of Certiorari filed by the Washington Area Transit Authority ("WMATA").

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 179 F.3d 929. The decision of the District Court is unreported.

JURISDICTION

The Court of Appeals entered its judgment on June 18, 1999. WMATA seeks to invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

WMATA contends that section 102(a) of the Americans With Disabilities Act (hereafter "ADA" or "Act"), 42 U.S.C. § 12112(a), is the pertinent statutory provision. That section provides that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."

STATEMENT OF FACTS

Michael Swanks suffers from an irreversible birth defect, spina bifida occulta. As a consequence, he is totally unable to control his urinary functions. His condition renders him highly susceptible to virulent and debilitating urinary track infections, which afflict him with severe nausea, lower back pain, diarrhea and fever. (App. 14-16; 282, 283). In 1992, WMATA fired Mr. Swanks from his position as a special police officer despite nearly three years of satisfactory performance. In 1993, he sued under the Americans With Disabilities Act ("ADA") (42 U.S.C. § 12101, et seq.), alleging, *inter alia,* that WMATA had fired him because of his disability.

From the outset WMATA did not dispute Mr. Swanks' disability. It argued instead that he was not a "qualified individual with a disability" because after his termination he successfully applied for Social Security Disability benefits.[1] WMATA also argued that Mr. Swanks was not

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[1] A successful case of disability discrimination requires the plaintiff to prove he is a "qualified individual with a disability," an individual who, though afflicted with a disability, "can perform the essential functions of [the job he holds], with or without reasonable accommodation." 42 U.S.C. §§ 12111(8), 12112(a).

"qualified" because his special police commission— assertedly a prerequisite for his job—had expired. The trial court held there were issues of fact regarding the latter issue, but granted summary judgment on the former. On appeal, the United States Court of Appeals for the District of Columbia Circuit reversed, holding that the receipt of Social Security disability benefits did not bar Mr. Swanks' ADA action. *Swanks v. Washington Metropolitan Area Transit Authority,* 116 F.3d 582 (D.C. Cir. 1997). *Cf., Cleveland v. Policy Management Systems Corporation,* 527 U.S. —, 119 S.Ct. 1592 (1999).

After a four-day trial a jury found that WMATA had fired Mr. Swanks because of his disability. Returning to the Court of Appeals, WMATA renewed its contention that the loss of the special police commission robbed Mr. Swanks of "qualified" status as a matter of law. It also argued that the evidence was insufficient to support the jury's finding of discrimination. Pet. App. 2a. The Court of Appeals rejected both contentions and affirmed the verdict. On the question of the special police commission, the Court of Appeals concluded that

> a reasonable juror could find that possessing the commission was not a prerequisite to being hired, and that new employees simply had to possess the *ability* to obtain such a commission, and hence the jury had sufficient evidence to find that Swanks was a "qualified individual" with a disability under ADA.

Pet. App. 9a. The Court of Appeals also found that the evidence as to WMATA's reasons for terminating Mr. Swanks was conflicting and that a reasonable juror could conclude that "WMATA, being unwilling to tolerate an employee with repeated absences, decided to apply its special commission requirement more strictly than it normally would to remove Swanks because of his disabilty." Pet. App. 10a.

ARGUMENT

WMATA offers nothing close to a "compelling" reason for a grant of review in this case. In two trips to the Court of Appeals, WMATA never argued that Mr. Swanks does not suffer from a disability as defined by the ADA. Nor did it suggest at any juncture that the Eleventh Amendment immunized it from Mr. Swanks' claims. Now it asks this Court to take jurisdiction on just those grounds. In addition, though it suggests otherwise, WMATA has identified no real conflict in the circuits resulting from the decision below.

1. WMATA first contends that this Court should review the judgment below to determine whether Mr. Swanks' condition constitutes a disability under the ADA. But it did not contest Mr. Swanks' disabilty status in the Court of Appeals. Rather its appeal focused on whether Mr. Swanks, *though suffering from a disability*, met the Act's additional requirement that he be "qualified . . . to perform the essential functions" of his job. 42 U.S.C. § 12112(a).

WMATA suggests that this Court's decisions last term in *Sutton v. United Air Lines*, 527 U.S. —, 119 S.Ct. 2139 (1999); *Murphy v. United Parcel Service, Inc.*, 527 U.S. —, 119 S.Ct. 2133 (1999); and *Albertson's Inc. v. Kirkingburg*, 527 U.S. —, 119 S.Ct. 2162 (1999) warrant an assumption of jurisdiction in this case. However, those decision addressed the scope of the Act's definition of "disability." They have no application to this case, where Mr. Swanks' disability has been conceded.

Moreover, having been to the Court of Appeals twice without contesting Mr. Swanks' status as a disabled individual, it is entirely inappropriate for WMATA to ask this Court to review that status now for the first time.

This Court has consistently held that it will not review questions that were not raised below. *See Delta Airlines v. August*, 450 U.S. 346, 362 (1981) ("question presented in petition but not raised in court of appeals is not properly before us"); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147, n.2 (1970) ("[w]here issues are neither raised before nor considered by the Court of Appeals, this Court will ordinarily not consider them.").

Even if it were appropriate for the Court to expend its resources examining questions which were not raised below, there are no important or novel issues lurking behind Mr. Swanks' heretofore conceded status as an individual with a disability. His condition unquestionably brings him within the Act's definition of disability. He has "a physical or mental impairment that substantially limits one or more of [his] major life activities." 42 U.S.C. § 12102(2)(A). "[P]hysical impairment," under the EEOC's regulations, includes a "physiological disorder . . . affecting [the] genito-urinary [system]," while "[m]ajor life activities" include "caring for oneself." *See* 29 C.F.R. § 1630.2(h)(1) & (i).[2] The "nature and severity of the impairment," its duration and its permanence are critical to the determination whether an individual is substantially limited in a major life activity. 29 C.F.R. § 1630.2(j)(2)(i-iii). The permanent and irreparable urinary incontinence endured by Mr. Swanks, together with its undisputed side effects, plainly constitutes a "physiological disorder . . . affecting [his] genito-urinary [system]," which "significantly restricts" his ability to carry out a most basic bodily function.

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[2] These EEOC regulations "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *See Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986).

Nothing in the reasoning of last term's decisions could alter this conclusion. The decisions in *Sutton* and *Murphy* essentially held that in evaluating a claim of disability under the ADA the effect of corrective measures must be taken into account. In *Sutton* the plaintiffs suffered from severe myopia. But the Court held that they were not disabled within the meaning of the ADA because with corrective lenses they "function identically to individuals without an impairment." 119 S.Ct. at 2149. Similarly, in *Murphy*, the Court held that a mechanic whose high blood pressure was entirely controlled by medication was not disabled within the meaning of the ADA.[3]

There are no corrective measures available to Mr. Swanks. He can take steps to minimize the more embarrassing manifestations of his disability, but there is nothing he can do to alter its affects on his bodily functions or its impact on his urinary track. Thus, there obviously were good reasons for WMATA's decision not to contest Mr. Swanks' disabled status in the Court of Appeals. Its change of position now is nothing more than obvious opportunism.

2. WMATA also argues that the Court should grant certiorari in order to use this case to resolve an asserted split in the circuits over the question "whether state-level sovereign entities such as WMATA are immune from suit under the ADA." Pet. at 6. This issue too is being raised for the first time in this Court. WMATA did not raise the

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[3] The concerns addressed by the Court in *Kirkingburg* are even further removed from the circumstances of this case. The question before the Court was "whether under the [ADA] an employer who requires as a job qualification that an employee meet an otherwise applicable federal safety regulation must justify enforcing the regulation solely because its standard may be waived in an individual case." 119 S.Ct. at 2165. The Court's resolution of this question obviously has no bearing on the proper disposition of this case.

question of imunity from suit under the ADA in the District Court or in either of its two visits to the Court of Appeals.

As with its eleventh hour request that the Court examine the question of Mr. Swanks' disability, WMATA may not now secure this Court's review of Eleventh Amendment claims which were not even suggested below. *See Pa. Dept. of Corrections v. Yeskey*, 524 U.S. 206, 212-213 (1998) (Title II of the ADA held applicable to state prison system, the Court declining to reach the question of Eleventh Amendment immunity which was "addressed by neither the District Court nor the Court of Appeals"); *Dothard v. Rawlinson*, 433 U.S. 323, 324, n.1 (1977) (Court refused to hear question of the constitutionality of Title VII's coverage of state governments: "Not having been raised in the District Court, that issue is not before us.")[4] As the Court has recently explained, even where Eleventh Amendment immunity is present, it may be waived when a state "allow[s] a federal court to hear and decide a case comemnced or prosecuted against it." *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 267 (1997). Unlike Article III of the Constitution, "[t]he Amendment . . . enacts a sovereign immunity from suit, rather than a nonwaivable limit on the federal judiciary's subject matter jurisdiction." *See id.*

In any event, no split in the circuits results from the decision below. In fostering its contention that the court of appeals decision has spawned a circuit conflict, WMATA describes itself as a "state-level sovereign" entity. This is misleading. For WMATA is, of course, not the arm of any state. It is rather a Compact Clause en-

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[4] *See also Delta Airlines v. August*, 450 U.S. 346, 362 (1981); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147, n.2 (1970), both discussed *supra*.

tity formed by the District of Columbia, Maryland and Virginia with the approval of Congress. There is no conflict in the circuits as to whether the Eleventh Amendment protects Compact Clause entities like WMATA from ADA claims.[5] This is quite unsurprising since just five years ago this Court held that such entities do not generally enjoy Eleventh Amendment immunity. *Hess v. Port Authority Trans-Hudson Corporation*, 513 U.S. 30 (1994). In short, even if the issue could properly be raised—which it cannot—there is no pertinent split in the circuits.

CONCLUSION

For the foregoing reasons, Respondent respectfully submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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November 1999

[5] To be sure, as WMATA notes in its Petition, one circuit, the Eighth, has recently concluded that the Eleventh Amendment protects the states from ADA suits. *Alsbrook v. City of Maumelle*, 184 F. 3d 999 (1999) (*en banc*)